APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,562

CAPITAL TRANSIT COMPANY, *Appellant*

v.

NETTIE E. FOSTER, CLURE EDDIE FOSTER, GENEVA CURRY, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from three final judgments totaling $39,000 following jury verdicts in favor of an automobile driver, her husband and a passenger in an auto which

ran into the rear end of a standing bus.[1] Jurisdiction of this Court to hear the appeal is based upon U. S. CODE, Title 28, Section 1291. The complaint, answer and final judgments appear on pages 2, 6 and 8-10 respectively, of the joint appendix.

STATEMENT OF CASE

The gist of the plaintiff's case, expressed in the pretrial order, was that the grandmother-passenger was in the Foster automobile driven by the plaintiff-wife when a bus of the defendant "swerved around and come to a sudden stop so that the automobile * * * collided with the bus, not having an opportunity to avoid the collision" (J.A. 8).

Only the driver testified in accordance with this theory of the accident (J.A. 18, 21-22). She claimed to have first sighted the bus through the rear view mirror (J.A. 26). Plaintiffs produced a police officer to whom the driver had stated on the day of the accident that *she did not remember anything about the accident* and that she remembered *following along after the bus* at about 25 miles per hour (J.A. 50-51). She made no claim to the policeman that the bus cut over in front of her and suddenly stopped (J.A. 50-51). Defendant produced the other Accident Investigation Unit police officer who likewise recalled that the driver stated that she remembered following behind the bus, that she did not remember anything about the accident and that she was doing 25 miles per hour (J.A. 68). Nothing on the police report indicated a claim that the bus cut over in front of the car and suddenly stopped (J.A. 69). The accident occurred between 6:30 and 7:00 a.m. in January, 1951 (J.A. 17). Five lights on the rear of the bus were burning (J.A. 73, 63; Ex. #5) as were the interior lights (J.A. 64). Two caution lights

[1] For purposes of identification references in this brief appear as "defendant" as to the appellant, Capital Transit Company; as "plaintiffs" as to the appellees collectively; and as "driver", "husband" and "grandmother-passenger" as to appellees individually. The husband was not a passenger but sued for loss of consortium and medical expense.

automatically lighted up when the brakes were applied (J.A. 73).

A disinterested prospective bus passenger who had been waiting for the bus saw it approach and stop with its center doors about opposite him (J.A. 62, 63). The bus was 35 feet long (J.A. 60). He walked to the front entrance, got on and was near the fare box when the auto hit the rear of the bus (J.A. 63, 67). This disinterested testimony was corroborated in all material respects by that of the bus operator (J.A. 72-73) who had given the same version to police at the scene of the accident (J.A. 48-49).

Defendant's request for a directed verdict, made at the close of all the evidence, was denied (J.A. 79). At the close of all the evidence, the trial court stated to defendant's counsel (J.A. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

After verdict, motion for judgment notwithstanding the verdicts, predicated upon lack of substantial evidence, and the alternative motion for a new trial, based upon the weight of the evidence (J.A. 11), were denied by the following Memorandum of Court (J.A. 12-13):

> "The Court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

This appeal is grounded upon the failure to direct a verdict in favor of defendant since no reasonable man could have accepted the plaintiff-driver's uncorroborated trial story, which was directly contradictory to that given by her to two disinterested police officers on the day of the accident as well as to all other testimony given in the case, and upon the trial court's abuse of discretion in failing to grant a new trial since the court acknowledged that the evidence certainly preponderated in favor of defendant.

STATEMENT OF POINTS

1. The Court erred in failing to grant defendant's motion for a directed verdict at the close of all the evidence and in denying the motion for judgment notwithstanding the verdict.

2. The Court abused its discretion in failing to grant a new trial since the evidence certainly preponderated in favor of defendant in the Court's opinion.

3. The Court prejudicially erred in using as the test on the motion for a new trial whether there was "substantial evidence to support the verdict of the jury" and therefore abused its discretion.

SUMMARY OF ARGUMENT

A. The two versions of the accident were: (1) that of the plaintiff automobile driver, totally unsupported by other testimony, that defendant's bus, travelling at 30 to 35 miles per hour, overtook her automobile, proceeding at 25 miles per hour, and suddenly stopped in front of it too late for her to avoid running into the rear of the bus; and (2) that of defendant, supported by its bus operator and the disinterested prospective passenger, that the fully lighted bus had been at a stop long enough for the passenger to walk from opposite the center doors of the bus and board it at the front when the automobile crashed into its rear. The automobile driver's own statement on the day of the accident to two police officers that she did not remember anything about the accident except that she was following the bus so discredited plaintiff's theory at trial that reasonable men could not have accepted as true her uncorroborated testimony on the issue of negligence when opposed by all the other evidence. Accordingly, the verdicts lack "substantial support" under the principle of *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951) *cert. denied* 342 U.S. 834. At most, the autoist's testimony amounted

to a "mere scintilla" which did not entitle plaintiff to go to the jury.

B. The new trial motion was expressly predicated upon the fact that the verdicts were against the "weight of the evidence". That the Court was of the opinion that they were against the weight of the evidence is established by its statement that (J.A. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

That the standard relative to the motion for judgment notwithstanding the verdict, i.e. whether there was substantial evidence to support the verdicts, was erroneously applied to the alternative motion for a new trial where the correct test should have been the "weight of the evidence" is established by the Memorandum of Court (J.A. 12-13):

> "The Court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

This holding reveals a fundamental misconception of the entirely different test to be applied to motions for judgment notwithstanding the verdict from that applicable to motions for a new trial. *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 249, 251 (1940). Therefore, the minimum relief to which defendant is now entitled is a new trial because the trial court was admittedly of the opinion that the evidence certainly preponderated in favor of the defendant.

ARGUMENT

A. SINCE REASONABLE MEN COULD NOT HAVE DIFFERED THAT UPON THE WHOLE EVIDENCE THERE WAS NO NEGLIGENCE UPON DEFENDANT'S PART, A VERDICT SHOULD HAVE BEEN DIRECTED IN ITS FAVOR.[2]

The pretrial order set forth the narrow issue to be tried as follows (J.A. 7-8):

> "The gist of the plaintiffs' case is that they were in an automobile and that a bus of the defendant corp. swerved around and came to a sudden stop so that the automobile in which plaintiffs were riding collided with the bus, not having an opportunity to avoid the collision."

This version was still the plaintiffs' contention when the case was submitted to the jury (J.A. 80, 82). At no time in the course of the trial was permission sought by plaintiffs to amend the pretrial order to assert other or additional theories. Accordingly, the present inquiry is whether there was substantial evidence establishing the negligence charged. It is hardly necessary to emphasize that the evidence must be "substantial" and that "a mere scintilla of evidence" is not deemed sufficient to raise a question upon which reasonable men might differ. *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951) *cert. denied* 342 U.S. 834; *Jackson* v. *Capital Transit Co.*, 69 App. D.C. 147, 99 F.2d 380 (1938); *Kresge Co.* v. *Kenney*, 66 App. D.C. 274, 86 F.2d 651 (1936).

The question of speed was mentioned by the Court in denying the motion for a directed verdict (J.A. 79):

> "I think I will let it go to the Jury. The testimony of the plaintiff was that she was going, as you say, from 20 to 25 miles an hour, that the bus driver was going

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[2] What is set forth in this section of the brief deals with insufficiency of the evidence to constitute substantial support for the verdicts. Therefore, what is contained herein supports *a fortiori* defendant's contention that the verdicts were against the weight of the evidence and that the Court abused is discretion in failing to grant defendant's motion for a new trial.

> from 30 to 35, and he cut in front of her. It is true she is contradicted. I will overrule the motion."

However, speed was not the negligence charged in the pretrial limitation of issues. Moreover, if the bus cut over as the autoist testified, its speed, moderate or otherwise, would have been immaterial. Prior speed was likewise immaterial if defendant's theory was correct, i.e., that the bus had been at a standstill prior to the rear end crash long enough for an aged passenger to come from opposite the middle of the 35 foot bus into the front entrance. By the same token, plaintiffs' labored point that the rear of the bus was further from the curb than the front is of no consequence. Any such prior negligence would have been a mere condition rather than a proximate cause of the accident, *Roanoke Ry. & Elec. Co.* v. *Whitner*, 173 Va. 253, 3 S.E.2d 169 (1939). Accordingly, the only real issue in the case upon which the evidence mattered was whether the plaintiffs' "cutting over" theory was supported by substantial evidence.

Defendant's version of the accident was so clearly established that no reasonable man could have failed to accept the true facts in view of the whole state of the evidence. As the bus driver said, he had stopped the bus about 15 or 20 feet past a waiting passenger (a 70 year old man) who came up on the front door before the automobile ran into the back end of the bus (J.A. 73). The passenger himself testified (J.A 63):

> "I was about middleways of the bus. By the time I walked from the middleways to the front to get on there, step on that first step up there, then this car hit the rear end.
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> * * * * *
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> "I was on the bus when he hit."

Since the walk of 15 to 20 feet must have consumed a minimum of 3 to 5 seconds (J.A. 73), and an automobile at 25 miles per hour covers approximately 37½ feet per

second, the autoist had at least 112.5 feet of clear space in front of her *after the bus was at a standstill with five lights shining* on its rear. No reasonable man could consider the stop negligent under such circumstances.

The driver was the only occupant of the automobile who claimed to have seen the accident (J.A. 34, 38). She alone, according to her testimony at the trial, purported to remember the bus coming alongside and cutting over to a stop so suddenly that she could not avoid running into it (J.A. 21). Not only is this self-serving account directly contrary to the disinterested testimony but it is irreconcilable with the driver's own confession to the two police officers on the day of the accident that she did not remember "anything about the accident" and that she was "following behind the bus" (J.A. 50, 51, 68). Moreover, it is significant that she never made a claim to the police that the bus had cut over in front of her (J.A. 50, 51, 69). It is inconceivable that to the investigating police on the day of the accident the driver would have failed to have accused the bus driver with causing the accident had he cut her off, as she testified 45 months later. Viewing the matter in the most charitable light possible toward the plaintiff-driver, her all night ride without sleep from North Carolina (J.A. 26, 27, 42, 43) had tired her so that she drowsed in driving the car into the rear of the bus and her last *true* recollection, as she told the police officers soon after the event, was "following behind the bus" (J.A. 51, 68).

It is respectfully urged that permitting the unsupported claim of these plaintiffs to go to the jury in this state of record was a travesty which it is the duty of this Court to correct. A $39,000 reward to plaintiffs for the driver's temerity in making her self-serving reversal of stories from that given to the police (one of whom was their own witness) is a shocking injustice. The driver's denial of talking with the police (J.A. 28) is as incredible as the similar sworn denial of a prior contradictory version given

by the plaintiff in the remarkably parallel case of *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F. 2d 621 (1951) *cert. den.* 342 U.S. 834. There the Court did not hesitate to conclude that "the verdict lacks substantial support" and to act accordingly.

The similarity in the *Maske* case evidence to that in the instant case is striking. In both cases were there two diametrically opposed theories of why the accident occurred; in both the disinterested passenger version supported the defendant's version; in both the interested plaintiff alone testified to the contrary; in both plaintiff flatly denied the defendant's version; in both "it was proved beyond reasonable doubt, although appellee denied" that she had told a disinterested person a version, irreconcilable with her trial version and consistent with defendant's version. In no material respect can the cases be distinguished and this Court should, therefore, repeat its forthright statement made there that:

> * * * we must conclude the verdict lacks substantial support. * * * we must hold that appellant's motion for a directed verdict should have been granted."

B. DEFENDANT WAS ENTITLED TO A NEW TRIAL BECAUSE AS THE TRIAL COURT ADMITTED, THE EVIDENCE PREPONDERATED IN ITS FAVOR. IT WAS AN ABUSE OF DISCRETION TO DENY THE NEW TRIAL BY APPLICATION OF THE ERRONEOUS "SUBSTANTIAL EVIDENCE" STANDARD WHEN "WEIGHT OF THE EVIDENCE" WAS THE TEST PROPERLY TO BE APPLIED.

Obvious prejudicial error was committed by the trial court in mistaking the test of a motion for judgment notwithstanding the verdict as being the standard applicable to a motion for a new trial. That this misconception accounts for the error in denying the new trial is unmistakable by reason of statements made by the Court, itself. Thus, the Court said to counsel for defendant that (J.A. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

This is an unequivocal expression of the Court's view as to where the "weight of the evidence" lay; and weight of the evidence was the sole ground urged for defendant's alternative motion for a new trial.[3] This being so, the new trial should have been granted for otherwise a trial judge is a mere "moderator of a town meeting" rather than an integral part of our judicial system charged with seeing that his instructions on the law are applied and that miscarriages of justice are corrected.[4]

We are not left to speculate as to why the judge erroneously failed to follow his view of the preponderance of the evidence and to grant the new trial because the "Memorandum of Court" supplies the answer that an erroneous standard was applied to the alternative motion for a new trial (J.A. 12-13):

> "The Court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

It is therefore clear that the trial court applied the same standard, i.e., "substantial evidence", in ruling upon both the motion for judgment notwithstanding the verdict and the alternative motion for a new trial. Since we know by the Court's own statement that the evidence "certainly" preponderated in favor of defendant, the prejudicial effect of applying the wrong test to the latter motion is clear.

Although sometimes confused by lawyers, the Courts have been careful heretofore to make clear the different considerations applicable on a motion for a directed verdict

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[3] Of course, the present argument assumes for the purpose of making it *only that the trial court was correct in denying the motion for judgment n.o.v., appellant is firmly* of the contrary view as has been fully discussed, *supra* pp. 6-9. [Italicized material omitted in original]

[4] *Patton* v. *Texas & Pacific Ry.*, 179 U.S. 658, 660 (1901): "• • • the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility."

and the later-stage motion for judgment notwithstanding the verdict under *Federal Rule of Civil Procedure* 50 (b)] is distinguished from a motion for a new trial. Thus, the Supreme Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940) said in pertinent part, at 249, 251:

> "The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that the verdict was against the weight of the evidence and was excessive; that the Court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims would have required a new trial whereas none of them could be considered in connection with the motion for judgment.
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> * * * * *
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> "The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, * * *"

As Judge Groner said, in *Pessagno* v. *Euclid Inv. Co.*, 72 App. D.C. 141, 144, 112 F.2d 577, 580 (1940):

> "A motion for directed verdict raises only the question whether reasonable men might differ on the question of negligence. * * * A motion for a new trial, however, may raise a myriad of other questions as to which appellant has the right to a ruling."

To the same effect see *Simmonds* v. *Capital Transit Co.*, 79 U.S. App. D.C. 371, 372, 147 F.2d 570, 571 (1945) which said that the trial judge was justified in concluding that the evidence preponderated against the plaintiff but *held* that judgment n.o.v. should not have been granted, pointing out that there was no alternative motion for a new trial.

Judge Parker set forth with clarity the distinction in question in *Garrison* v. *United States,* 62 F.2d 41, 42 (4th Cir. 1932):

> "There seems to be some confusion on the part of counsel as to the difference between the duty to direct a verdict and the duty to grant a new trial after verdict; and the contention is frequently made that the judge should direct a verdict whenever the evidence is such that he would be justified in setting the verdict aside. The distinction, however, is clear. *Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side;* for under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. *He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence,* or is based upon evidence which is false; for *even though the evidence be sufficient to preclude the direction of a verdict,* it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice." (Emphasis supplied)

Since the trial court applied an erroneous test which resulted in denial of a new trial instead of its grant, the action was an abuse of discretion amounting to an error of law. As was said in *Boyle* v. *Bond,* 88 U.S. App. D.C. 178, 179, 187 F.2d 362, 363 (1951):

> Although the record reveals a fair and impartial attitude by the presiding judge, in denying the motion for a new trial there was a failure to recognize the great disparity between the proof and the jury's award, which technically, constituted an abuse of discretion amounting to an error of law."

The prejudicial effect of the Court's error of law being inescapable from its expressed opinion that the evidence "certainly" preponderated for defendant, a new trial is the relief to which defendant is now entitled.

CONCLUSION

Since on the record as a whole there was not substantial support for the verdicts in the plaintiff driver's uncorroborated trial version of a "cutting over", particularly in view of her previous contradictory statement "proved beyond reasonable doubt, although appellee denied" this case should be reversed upon the principles expressed in *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951) *cert. denied* 342 U.S. 834, with direction to enter judgment in favor of defendant. At the very least, a new trial should be ordered in view of the palpable abuse of discretion in failing to apply the correct standard to the motion for a new trial.

Respectfully submitted,

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